No. 392.

Brf. of Cross for P. C. (mo.)

Office Supreme Court U.
FILED
MAR 16 1900

Filed Mar. 16, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

ELLEN J. O'PHINNEY, GERARD C. TOBEY, HORACE P. TOBEY ET AL., *Plaintiffs in Error.*

vs.

THE TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL, *Defendants in Error.*

ANSWER TO MOTION TO DISMISS THE WRIT OF ERROR.

ABNER McKINLEY,
E. J. D. CROSS,
Counsel for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

ELLEN J. O'PHINNEY, GERARD C. TOBEY, HORACE P. TOBEY ET AL., *Plaintiffs in Error.*

vs.

THE TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL, *Defendants in Error.*

ANSWER TO MOTION TO DISMISS THE WRIT OF ERROR.

In 1853 Moses Sheppard procured a charter from the State of Maryland constituting himself and others a corporation, under the title of "The Trustees of the Sheppard Asylum," to found and maintain an asylum for the insane. (Charter, Plaintiffs' Exhibit A, page 6.)

By his will in 1855 he gave to it all his estate, except a few little legacies. (Will, pages 99-100.)

On the same day he left careful instructions to his Trustees as to the institution he meant to establish, expressly desiring that it should be kept separate and distinct from any institution of a similar character. (Defendants' Exhibit Examiner G. A. P. No. 3, page 169.)

Up to the time of the transaction now dealt with there had been no endowment of the institution except by Moses Sheppard, its founder. (Testimony of George A. Pope, questions 5–8, page 113.)

It is not questioned that the institution was founded and the charter secured by Moses Sheppard and his name given to it.

In the year 1896 a will was probated, made in 1893, by one Enoch Pratt, a very wealthy man. In it he offered to the Trustees and the State what he called a "bargain," viz, that if the trustees would consent to change the name of the institution from "Asylum," as established by Sheppard, to "Hospital," and would put his whole name into the title, and the Legislature would make the change, he would leave to the said Trustees a residue of his estate. (Enoch Pratt's Will, clause 12, page 15.)

The Trustees accepted the "bargain," and the Legislature passed an Act purporting to change the name, setting forth that one object of passing the Act was the "securing for the people of Maryland the benefit of a large addition to the present buildings, etc."—so admitting a consideration moving to the State for its action. (Plaintiffs' Exhibit E. Act of 1898, ch. 17, page 17.)

Moses Sheppard had been dead forty-one years. Plaintiffs contend that the State of Maryland had no power to enter into such bargain, and that the Act so passed is an impair ment of the contract entered into by the State with Moses Sheppard and therefore void.

The fact that the offer is made in a will, the fact of the large amount offered, the fact that the high contracting parties are willing to leave the founder's name as part of the title, do not affect the principle at all. The essential fact is the offer by a capitalist of a sum of money to certain trustees and a State, if they will substitute his name for that of the founder, as given by the Charter, and the attempt by the State to make good the bargain. To look at the case in its

simplicity we must suppose the case of a living man offering the Trustees of the Johns Hopkins University in Baltimore, and the State of Maryland ten thousand dollars to change its title to the Tom Jones Brewery. Such a case is covered by the principle here involved.

We will now ask the Court's attention to the points made as to the right of the Legislature to pass this law.

Keeping of Name not a Condition of Gift.

The defendants claim that there can be no objection to this change because Moses Sheppard did not, in his will, require the keeping of the name. But it can not be claimed that the donor in such case shall provide against any and every ghoulish act. When a man had a charter gotten out in his own name, and left his whole fortune to trustees for a charitable purpose, he could hardly be expected to provide against his own trustees selling his name for a sum of money. He would just as naturally have thought of their selling his bones. We claim, therefore, that the giving of his name and the keeping of his name were a distinct part of the agreement between Moses Sheppard and the State and the Trustees. In the case of an individual the right to so treat a contract would never be upheld for a moment.

Can We Raise the Question.

Defendants in error aver that if there were a contract between the State of Maryland and Moses Sheppard, the question of this Act impairing its obligation, it could only be raised by the Trustees, the parties to the contract. Undoubtedly any ordinary question of the management of the institution itself would rest wholly with them. This case, however, is peculiar. Such a change in the case of a trading corporation would not rest with the directors, but would be of a character only to be authorized by the stockholders. Here we have no stockholders. Is there a point where the power of such Trustees ends? If the power of Trustees extends to

the effecting such a complete change, it extends to a complete alteration of the purpose of the institution. The Trustees, with the sanction of the Legislature, can change this to a brewery or other trading corporation. Or they can, with the sanction of the Legislature, wind it up, and divide the fund. The Constitution of Maryland under which this charter was given, reserves the right to alter or repeal as set forth in defendants' motion on *page 7*. There can be no doubt that such proceeding was no more foreign to the understanding of Moses Sheppard than the selling his name.

Has the founder of an institution any interest in the connection of his name with it? No one will question it for a moment. In the Dartmouth College case, Chief Justice Marshall says: "Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred." (4 Wheaton, page 630.) Has he any right in it that the Courts will respect? If so, in such a case as the present, the Trustees not only do not represent him, but they are the last people to entrust with that interest. It is abhorrent to the whole nature of our law that the managers of an institution to whom a sum of money is offered to erase the name of the founder, should be the people to represent the founder's interest. Their interest is in the institution, and anything calculated to financially strengthen that institution is an appeal to their strongest motives. Their interest is directly antagonistic to any such right of the founder, if he has any right. They are really disabled from sitting on such a question. A valuable consideration is offered both to the Trustees and the State antagonistic to the interest of the founder, and we are told that they only represent that interest. Who then can raise the question? The founder is dead.

We hold that the Act of the Legislature is a nullity and any one having an interest that is affected by it can raise the question. The plaintiffs in error have a personal interest in that if the Act is void the legacy goes to them. (Will of Enoch Pratt, page 16, clause 12.)

DOES THE ACT IMPAIR THE OBLIGATION OF A CONTRACT.

What was the original contract? The Constitution under which the Sheppard Charter was passed reserved the right to alter or repeal all charters. It is needless, however, in this Court, to say that such a provision does not give the right to take property acquired on the faith of such charters. The Act admittedly obtained by Sheppard was passed in 1853, affixing his name to the institution. In 1855, *on the faith of that Act*, he gave all his property to an institution bearing his name. By the present Act the name is changed and the corporation, with the name so changed, is given in terms the right to hold all the property now held by it. (See Act 1898, ch. 17, pages 11-12.) Every dollar of that property was given by Moses Sheppard. So that we have the case of a man getting a charter in his own name, giving his property to the institution so named, and a Legislature enacting that the donor's name shall be taken from the institution, but his money shall still be held by a corporation with a different name.

The contract between the State and Moses Sheppard was a charter to "The Trustees of the Sheppard Asylum"—the grant of his estate to that corporation. "The Trustees of the Sheppard and Enoch Pratt Hospital," the new corporation. This another and separate corporation. This we submit is a violation of the Constitution.

Can it be that the power rests with the Trustees of an institution to sell the name of its founder in the open market, and that the Legislature which gave the Charter can ratify the sale?

ABNER McKINLEY,
E. J. D. CROSS,
Counsel for Plaintiffs in Error.